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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

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FRANCIS G. MANTZARIS,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on the 30th day of September, 1971, which affirmed a judgment of conviction by the Honorable JOHN M. CANNELLA, sitting without a jury in the United States District Court for the Southern District of New York.

Petitioner was convicted of four counts of conspiracy, in violation of Title 18, United States Code, Section 371; four counts of aiding in the making of false statements, in violation of Title 18, United States Code, Sections 1001 and 1002; and one count of corruptly endeavoring to influence a witness, in violation of Title 18, United States Code, Section 1505. All counts involved the immigration laws of the United States.

### No Opinion Below

The judgment of conviction of the District Court was affirmed without opinion of the Circuit Court.

## Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 30th day of September, 1971 (Appendix "A", *infra*, p. 16 *id.*). No petition for rehearing has been made to the Circuit Court of Appeals for the Second Circuit; nor have any extensions of time been granted within which to file this petition. Jurisdiction of this Court is invoked under Title 28, Section 1254(1) United States Code and Rule 22(2).

## Questions Presented

(1) Whether the remarks of the District Judge throughout the trial established an erroneous standard of constructive knowledge as the basis for a finding of criminal guilt and whether the Court of Appeals erred in sanctioning the improper substitution of such an erroneous standard.

(2) Whether the District Judge merely found that petitioner was guilty of constructive knowledge and whether the Court of Appeals erred in sanctioning the District Judge's failure to require proof of petitioner's actual knowledge of the falsity of the alien's statement, when presented to the Bureau of Immigration?

(3) Whether the repeated remarks of the District Judge to the effect that petitioner "should have known" constituted a de facto finding of fact.

(4) Whether the application of such erroneous fundamental principle of governing law by the District Judge was justified by the waiver of formal findings of fact and whether the Court of Appeals erred in sanctioning such deprivation of petitioner's constitutional right to due process of law and a fair trial.

(5) Whether the law of the Ninth Circuit as expressed in *Wilson* v. *United States,* 250 F. 2d, 312, and the District of Columbia Circuit in *Hightower* v. *United States,* 325 F. 2d, 616, that reversible error exists where a Judge sitting without jury demonstrates a fundamental misunderstanding of the evidence or governing law and that an accused must be fairly tried and convicted according to proper legal procedure and standards should not be applicable to the instant case in the Second Circuit and whether the Court of Appeals erred in sanctioning the actions of the District Judge in scanning the trial transcript for *factual proof of probable guilt,* in view of the implied findings declared by the District Judge throughout the trial?

(6) Whether the District Judge erroneously imposed upon petitioner (an attorney) the burden of investigating his clients' veracity and whether petitioner assumed the risk of reliance upon his clients' stated version of the facts.

(7) Whether the Court of Appeals erred in sanctioning the improper introduction into evidence of the four "similar act" marriages?

(8) Whether the Court of Appeals erred in sanctioning the failure of the District Judge to dismiss the indictment for failure of proof as a matter of law.

## Statutes

18 U.S.C. § 2. PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

18 U.S.C. § 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. § 1001. STATEMENTS OR ENTRIES GENERALLY.

Whoever, in any matter within the jurisdiction of any department or agency, of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

18 U.S.C. § 1505. OBSTRUCTION OF PROCEEDINGS BEFORE DEPARTMENTS, AGENCIES AND COMMITTEES.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any Committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years or both. June 25, 1948, c. 645, 62 Stat. 770; Sept. 19, 1962, Pub. L. 87-664 § 6(a), 76 Stat. 551.

18 § 1546. Fraud and Misuse of Visas, Permits, and Other Entry Documents.

Whoever, knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possessed any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade

the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells, or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years or both. June 25, 1948, c. 645, 62 Stat. 771; June 27, 1952, c. 477, Title IV, § 402(a), 66 Stat. 275.

AMENDMENTS TO U. S. CONSTITUTION
AMENDMENT [V]

In pertinent part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

## Other Authority Cited

FEDERAL JURY PRACTICE AND INSTRUCTIONS, DeVitt and Blackmar, 2nd Ed. Vol. 1, § 33.05:

> "An act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident or other reason. An act is done 'willfully' if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. *The word 'knowingly' is added in order to insure that no one would be convicted who made* (or

caused to be made) *a statement or representation which was false because of mistake or accident or other innocent reason.*" (Emphasis added.)

## Statement of Case

On April 21, 1971, after a non-jury trial before Honorable John M. Cannella, in the United States District Court for the Southern District of New York, a judgment of conviction was entered against the petitioner.

The petitioner, a member of the Bar of the State of New York, specializing in immigration matters was convicted of four counts of conspiracy to impair, obstruct and impede the administration of the Immigration Laws of the United States, and five substantive counts, four for aiding in the making of fraudulent statements in connection with immigration matters, and one count (Count 8) of corruptly influencing a witness (5a-27a).

The offenses charged involved marriages of Greek aliens with American citizens to obtain permanent residence in the United States.

The petitioner was the attorney for each of such aliens.

The petitioner was sentenced to concurrent one year terms of imprisonment on each count, which sentence was suspended and the petitioner placed upon two years probation, and in addition thereto, fines aggregating $25,000 were imposed upon the petitioner of $1,000 on Count 8 and a committed fine of $3,000 on each of the other eight counts.

Throughout the trial, the remarks of the District Judge indicated that mere proof of constructive knowledge would suffice for a finding of guilt.

"The Court: * * * don't you feel maybe you should have called them in? In that case, for example, it

turns out the girl never met the fellow until three days before they got married. You never found that out?

"The Witness: I never knew that. That was not what was said to me." (681a)

Further on, with regard to the Spiros marriage:

"The Court: That seemed to indicate you had some question in your mind?" (613a)

Likewise regarding Karathanasis (a "similar act" marriage), the Court inquired:

"The Court: Did you realize at the time that he was a Greek and that she was a Spaniard?

"The Witness: I realized at that time that he was Greek and she was Spanish.

"The Court: Did you realize they had very little communication?

"The Witness: I felt they had communication, that he was able to communicate with his wife. I speak Spanish, too. She spoke English, and he spoke a little English, too." (735a-736a).

* * *

"The Court: I am aware that that was your testimony in direct, that there are a lot of things you seem to feel were irrelevant in these cases. You approach them from the single point of an immigration lawyer, and then everything else is immaterial to you to some degree. (613a)

"The Court: But you are supposed to have sort of red badges as you talk to these people because you are familiar with those expressions in the law indicia of fraud and red badge, something that alerts you that something is wrong.

You yourself say you approach these marriages with the idea of being convinced it is bona fide.

It seems to me if two people come to you and neither

of them speak each other's language, that raises a badge that says you must look into it further. (614a)

• • •

"The Court: The point is it seems to me that what you do, what you have done to this point, unless you have changed your format, and you apparently say you have, that you took everything they said at face value and if they said it, you accepted it." (614a-615a)

• • •

"The Court: He learned at the hearing this was a phony address, to put it in the vernacular. He was asked: 'Did that make any impression on you?' I think I could have answered that question for him, because his opinion of these matters is that they are immaterial matters; as long as there is a marriage, he couldn't care less. That seems to be his attitude here." (628a).

• • •

"The Court: I think his mental processes are very much in issue in this case. As a matter of fact, as I understand it, you can correct me if I am wrong, it is the only issue in this case. . . .

It seems to me the only element that is material and that is in issue both by way of the plea and the way the evidence has developed and the concessions that have been made is the solitary thing: whether he acted lawfully, knowingly and willfully.

• • •

The Court: Under the circumstances, since his mental operations are involved, I will allow a question of this kind." (580a-581a)

Despite this declaration that the sole issue was one of actual knowledge, the District Judge nevertheless permitted an interrogation of the petitioner as to constructive knowledge.

*"By Mr. Tripp:*

"Q. Did that [the age difference i.e. 10 years difference between Damkas' spouses] raise any question in your mind as to the bona fide nature of this marriage? (581a)

* * *

## Reasons for Granting the Writ

1) Questions "1" through "6" all relate to the lack of a fair trial and the denial of due process of law.

The District Judge first imposed a new standard of law upon which to bottom a finding of guilt, viz., "constructive knowledge", and then proceeded to factually find that the petitioner should have known of the fraudulent intent and purposes of the aliens in entering into such marriages with American citizens.

The District Judge equated himself with the petitioner and indicated that he would have acted differently under the same circumstances in that he would have investigated the clients' stories.

Nor is there any obligation or duty upon an attorney to verify the truth of his clients' factual statements. Certainly, the failure to do so can not impose criminal liability upon an attorney.

The government utterly failed to establish that petitioner knew of the falsity of his clients' statements, *at the time* they were submitted to the immigration service.

The statute mandates a finding of actual knowledge as a prerequisite to a finding of guilty. *United States* v. *Crimmins,* 123 F. 2d 271 (2nd Cir. 1941), *United States* v. *Krosky,* 418 F. 2d 65 (6th Cir. 1969), *United States* v. *Byrd,* 352 F. 2d 270 (2nd Cir. 1965), *Pinkerton* v. *United*

*States,* 328 U.S. 640 (1946), *Phillips* v. *United States,* 356 F. 2d 297 (9th Cir. 1965).

In the last case above cited, the Court stated:

> ". . . it is the *personal knowledge* of the invidious fact which warrants such an inference, nothing less than personal knowledge of that fact will do to establish the fact even circumstantially. Thus so-called 'constructive' notice or knowledge of a circumstance, agent or employee, has no tendency, circumstantially or otherwise to prove criminal intent." (Emphasis added.)

And in *Windsor* v. *United States,* 384 F. 2d 636 at 536 (9th Cir., 1967), the same Court reached the same conclusion in stating:

> "His knowing participation in a scheme to defraud is an essential part of the government's case . . . [citations omitted]. . . . This element may be established circumstantially, but cannot be based on so-called 'constructive' knowledge because of facts known to others with whom appellant was involved in this scheme."

To the same effect are *Reisman* v. *United States,* 409 F. 2d 789 (9th Cir. 1969), *United States* v. *Joralemon Brothers, Inc.,* 174 F. Supp. 262 (E.D.N.Y. 1959), *Inland Freight Lines* v. *United States,* 191 F. 2d 313 (10th Cir. 1951).

It is apparent that the District Judge substituted his own highly commendable standards and requirements for those of the statute. Such hindsight preemption of the legislative function is erroneous.

Nor does the "general verdict" rule apply to this non-jury case, during the course of which the District Judge made known his requirements and findings. In view of such "buit-in" and *de facto* findings of fact, the mere

waiver of more formal findings does not serve to activate the "general verdict" rule. In any event, such rule does not qualify as a cure-all for erroneous rulings of law.

Similarly, the erroneous rulings of the District Judge cannot be rationalized by a finding of probable guilt. The guilt, if any, of the petitioner must be established upon a fair trial. The error of the District Judge in imposing the lesser standard of constructive knowledge and in finding that the facts established that the petitioner "should have known" of the falsity of the aliens' statements, cannot be cured by scanning the remainder of the transcript for facts tending to establish actual knowledge. *Wilson* v. *United States,* 250 F. 2d 312 (9th Cir., 1958), *Hightower* v. *United States,* 325 F. 2d 616 (D.C. Cir., 1964), *United States* v. *Milton,* 421 F. 2d 588 (10th Cir., 1970), *Bollenback* v. *United States,* 326 U.S. 607.

2) Question 7 relates to the improper introduction into evidence of the four "similar act" marriages, not referred to in the indictment.

The Court recognized that the primary, if only, issue in the case was whether appellant acted knowingly (31a; 581a). The marriages and the filings were admitted and the facts that proved to be falsely stated in the petitions and testimony were conceded (30a).

It is significant to know that the proof of similar acts was prematurely introduced as part of the Government's main case. The vice of such a procedure is glaringly illustrated in this case. The only justification for admitting such evidence was the fallacious assumption that the defense would be based in part upon lack of intent. However, intent was not placed in issue by the petitioner. In a situation such as this, where the Government prematurely introduces evidence of similar acts predicated upon the presumptuous belief that intent would be placed in issue by the petitioner, the Government must assume

the risk that there would be no such issue to be contested and hence, such evidence would be inadmissible.

It is almost hornbook law that proof of similar acts will not be admitted where intent is not at issue. *United States* v. *Deaton,* 381 F. 2d 114 (2nd Cir. 1967), *United States* v. *Jones,* 374 F. 2d 414 (2nd Cir. 1967), *United States* v. *Braverman,* 376 F. 2d 249 (2nd Cir. 1967), *United States* v. *Knohl,* 379 F. 2d 427 (2nd Cir. 1967), *United States* v. *Bilotti,* 380 F. 2d 649 (2nd Cir. 1967), *United States* v. *Byrd,* 352 F. 2d 570 (2nd Cir. 1965).

Nor can the Government belatedly rationalize that "intent" and "knowledge" are interchangeable. *DeVitt and Blackmar,* Federal Jury Practice and Instructions (2nd Ed.).

It appears that the Government resorted to prosecution by "quantity" in lieu of "quality" of evidence.

3) Question 8 relates to the Government's failure to prove the violations charged, as a matter of law.

As to Counts 1 through 7 and 9, the ruling in *United States* v. *Diogo,* 320 F. 2d 898 (2nd Cir. 1963), is controlling and mandates reversal.

In view of the equivocal nature of the testimony as to the facts surrounding each marriage and absent, proof that such purported "sham marriages" were invalid or voidable under State Law, there can be no conviction. The transcript is devoid of any proof of the invalidity or voidability of any of such marriages. Certainly there is a presumption of validity.

As to Count 8, the testimony adduced on pages 426a and 427a of the transcript as set forth at length in petitioner's Brief before the Court of Appeals clearly indicates that petitioner thereby did not violate the law.

*United States* v. *Polakoff*, 121 F. 2d 333 (2nd Cir. 1941).

## Conclusion

The issues above discussed as well as the other points of the petitioner's Brief before the Court of Appeals are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRWIN KLEIN,
Counsel for Petitioner.

## Appendix A

# United States Court of Appeals

FOR THE

SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of September one thousand nine hundred and seventy-one.

Present: Hon. J. Edward Lumbard,
Hon. Walter R. Mansfield,
Hon. James L. Oakes,
*Circuit Judges.*

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United States of America,
Plaintiff-Appellee,

v.

Francis G. Mantzaris,
Defendant-Appellant.

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Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk